

Department of the Treasury  
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Refer Reply To:  
CC:TEGE:EOEG:EO1  
PLR-123064-08

Date:  
September 03, 2008

Trust:

### Agreement:

Employer:

State:

Dear \_\_\_\_\_ :

This letter responds to a letter from your authorized representative dated May 9, 2008, as well as additional correspondence, submitted on behalf of the Trust, requesting a ruling that the Trust's income is excludable from gross income under § 115(1) of the Internal Revenue Code.

## FACTS

The Agreement creates a multiple-employer pooled trust (the Trust) pursuant to State law, open to participation only by government entities (Employers) in the State whose income is excludable from federal income taxation under § 115 of the Code. The purpose of the Trust is to provide a vehicle for Employers to pre-fund retiree health care. The Trust will receive contributions from Employers that adopt the Trust to assist in funding their obligations to provide post-employment, non-pension benefits.

An independent, nondiscretionary trustee will serve as the custodian of Trust assets and will provide certain administrative services to the adopting employers. With respect to the assets of each adopting employer, to be held in a legally separate and individual account, the trustee will be subject to the direction of a plan administrator appointed by the employer (or, in the absence of such appointment, the employer itself).

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The plan administrator may engage a professional investment advisor or manager to assist in selecting and monitoring investments.

A five-member advisory committee, the majority of which must be employees of the adopting employers and selected by a majority vote of the plan administrators, will be responsible for oversight of the trustee and the administrative and investment management services. Except for the power to appoint or remove the trustee by majority vote, and the limited authority to amend the Agreement to the extent necessary to assure that the Trust complies with federal and state law, the advisory committee will serve strictly in an advisory capacity. The committee will have no power or authority to interfere with the employers rights to control their separate accounts through the plan administrators.

Trust assets may not be assigned, alienated, attached, or garnished. Amendments to the Agreement may not revoke the Trust or cause assets to be diverted from the exclusive purpose of providing post-employment health and welfare benefits to eligible employees and paying the reasonable expenses of the Trust. The termination of an adopting employer's plan to provide post-retirement benefits other than pensions will not result in the employer recovering the assets in its separate account in the Trust, except upon the complete liquidation of the employer's obligation to provide further such benefits under applicable law, or the assumption of all such benefit obligations by the Social Security Administration or other government agency.

The Trust represents that the following statement will appear in bold type on the first page of the adoption agreement between each Employer and the Trust.

No guaranty that payments or reimbursements to employees, former employees or retirees will be tax-free. The Trust has obtained a ruling from the Internal Revenue Service concerning only the federal tax treatment of the Trust's income. That ruling may not be cited or relied upon by the employer whatsoever as precedent concerning any matter relating to the employer's health plan(s) (including post-retirement health plans). In particular, that ruling has no effect on whether contributions to the employer's health plan(s) or payments from the employer's health plans (including reimbursements of medical expenses) are excludable from the gross income of employees, former employees or retirees, under the Internal Revenue Code. The federal income tax consequences to employees, former employees and retirees depend on the terms and operation of the employer's health plan(s).

## LAW AND ANALYSIS

Section 115(1) of the Code provides that gross income does not include income derived from any public utility or the exercise of any essential government function and accruing to a state or any political subdivision thereof.

In Rev. Rul. 77-261, 1977-2 C.B. 45, income from an investment fund, established under a written declaration of trust by a state, for the temporary investment of cash balances of the state and its participating political subdivisions, was excludable from gross income for federal income tax purposes under § 115(1). The ruling indicated that the statutory exclusion was intended to extend not to the income of a state or municipality resulting from its own participation in activities, but rather to the income of a corporation or other entity engaged in the operation of a public utility or the performance of some governmental function that accrued to either a state or municipality. The ruling points out that it may be assumed that Congress did not desire in any way to restrict a state's participation in enterprises that might be useful in carrying out projects that are desirable from the standpoint of a state government and which are within the ambit of a sovereign properly to conduct. In addition, pursuant to § 6012(a)(2) and the underlying regulations, the investment fund, being classified as a corporation that is subject to taxation under subtitle A of the Code, was required to file a federal income tax return each year.

In Rev. Rul. 90-74, 1990-2 C.B. 34, the Service determined that the income of an organization formed, funded, and operated by political subdivisions to pool various risks (casualty, public liability, workers' compensation, and employees' health) is excludable from gross income under § 115. In Rev. Rul. 90-74, private interests neither materially participate in the organization nor benefit more than incidentally from the organization.

The Trust provides health and welfare benefits to retired employees of the participating employers. Each of the Trust's participating employers is required to be a state, a political subdivision of a state, or an entity the income of which is excluded from gross income under § 115(1). Providing health and welfare benefits to current and former public employees constitutes the performance of an essential government function. Based upon Rev. Rul. 90-74 and Rev. Rul. 77-261, the Trust performs an essential governmental function within the meaning of § 115(1).

The income of the Trust accrues to its participating employers, all of which are political subdivisions or entities the income of which is excluded from gross income under § 115(1). No private interests participate in, or benefit from, the operation of the Trust other than as providers of goods or services. Trust assets may never inure to the benefit of, or be recovered by, an employer, except for a mistake of fact, the complete

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liquidation of the employer's obligation to provide post-employment benefits, or the assumption of that obligation by a government agency. Any assets remaining in a separate account after satisfying all benefit obligations shall be paid to the employer to the extent permitted by law and consistent with § 115. See Rev. Rul. 90-74.

Based solely on the facts and representations submitted by the Trust, we conclude that the income of the Trust is derived from the exercise of an essential governmental function and will accrue to a state or a political subdivision thereof for purposes of § 115(1). Consequently, we hold that the Trust's income is excludable from gross income under § 115(1).

Except for the specific ruling above, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding the classification of the Trust as a trust for federal tax purposes or regarding the federal tax consequences of contributions to, or payments from, an Employer's health plan(s), including (but not limited to) whether contributions to the plan(s) are excludable from the gross income of employees, former employees or retirees under § 106 and whether payments from the plan(s) (including reimbursements of medical expenses) are excludable from the gross income of employees, former employees or retirees under §§ 104 or 105.

Under a power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

This ruling is directed only to the taxpayer who requested it. According to ' 6110(k)(3), this ruling may not be used or cited as precedent.

Sincerely,

SYLVIA HUNT  
Assistant Chief  
Exempt Organizations Branch 2  
Office of Division Counsel /  
Associate Chief Counsel  
(Tax Exempt & Government Entities)

Enclosures: copy for ' 6110 purposes